Supreme Court, U.S.
FILED
SEP 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1728

IN THE

United States Supreme Court

October 1985 Term

J. PLACIDO GARCIA

V.

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, LEO LUJAN, MARGENE HARRIS, DANIEL TRUJILLO and DAVID SHORTESS, Individually and as Members of the Socorro Consolidated School District.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Rule 22.6 of the Rules of the Supreme Court, Petitioner hereby supplements the Statement of the Case and the Appendix to reflect a recent Memorandum Opinion and Order of the District Court in this case, J. Placido Garcia, Plaintiff, v. Board of Education of the Socorro Consolidated School District, et al., United States District Court for the District of New Mexico, CIV No. 80-399HB. The Memorandum Opinion and Order was entered on docket and filed on August 15, 1986.

STATEMENT OF THE CASE

On August 15, 1986, The Honorable Howard Bratton, Chief Judge of the United States District Court for the District of New Mexico issued a Memorandum Opinion and Order settling the issue of costs. In that Opinion and Order, he in substance made

certain findings which bear directly upon the issue of waiver of the Eleventh Amendment, among the findings are the following:

1. "At trial the attorney for the defendants made representations to the court and plaintiff that lead the court to believe that defendants would not raise the Eleventh Amendment as a bar to suit if defendants were dropped in their individual capacities." At Page 2.

2. "Had defendants pursued the defense earlier, the plaintiff would not have been prejudiced in his decision to drop the individual defendants." At Page 2.

3. "Plaintiff should not now be made to pay for his reliance on defendants' failure to raise the defense at trial, the defendants having specifically denied that there would be any bar to recovery should a verdict be rendered for plaintiff." At

The Court then refused to award the defendants their trial costs or their costs of transcripts in part because of Defendants-Appellees conduct in connection with the Eleventh Amendment issue. A verbatim reproduction of the opinion and order is included in the appendix.

Respectfully Submitted:

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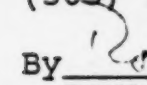
By 
RONALD J. VanAMBERG
Counsel for Petitioner

CERTIFICATE OF FILING

I, Ronald J. VanAmberg do affirm and state that on the 4th day of September,

1986, I placed with Federal Express forty copies of the Supplement to Petition for Writ of Certiorari addressed to the Clerk of the Supreme Court of the United States.

Ronald J. VanAmberg

The foregoing was acknowledged before me on this 4th day of September, 1986.

Notary Public

CERTIFICATE OF SERVICE

I, RONALD J. VanAMBERG, do certify that on the 4th day of September, 1986, I mailed a copy of the Supplement to Petition for Writ of Certiorari to opposing counsel:

Jo Saxton Brayer
Post Office Box 1888
Albuquerque, New Mexico 87103

and

J. Douglas Compton
Post Office Box 1276
Albuquerque, New Mexico 87103

APPENDIX -- F

J. PLACIDO GARCIA,

Plaintiff,

vs.

BOARD OF EDUCATION OF THE SOCORRO CONSOLIDATED SCHOOL DISTRICT, et al.,

Defendants.

FILED
United States District Court
Albuquerque, New Mexico
August 15 1986
Jesse Casaus, Clerk
CIV NO. 80-399 HB
Entered on Docket
Aug 15 1986

MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiff's motion to review order settling costs and defendants' objection to order settling costs. The court, having considered the motions, finds that costs will be awarded in favor of the defendants in the amount of $231.45.

Supersedeas Bond

Defendants seek reimbursement for supersedeas bond premiums in the amount of $20,216.40. However, as a political subdivision of the state of New Mexico, McWhorter v. Board of Education, 63 N.M.

421, 320 P.2d 1025 (1958) the Board of Education was not required to post a bond to stay execution. Local Rule 18(h)(2). Furthermore, under the New Mexico Constitution, Article XIII, sec. 7, plaintiff was not entitled to execute against defendants. Thus defendants are not entitled to recover the cost of the bond as a necessary cost of the appeal.

Trial Costs and Costs of Transcripts

Rule 54(d) states "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Under this rule the court has a limited discretion to disallow costs although there is a strong presumption in favor of awarding costs, Serna v. Manzano, 616 F.2d 1165 (10th Cir. 1980).

The present case represents an unusual circumstance in which costs are appropriately denied to the prevailing party. At trial the attorney for

defendants made representations to the court and plaintiff that led the court to believe that defendants would not raise the eleventh amendment as a bar to suit if defendants were dropped in their individual capacities. The issues of individual liability, punitive damages and qualified immunity were then omitted from the charge to the jury. After a verdict was rendered against defendants in their official capacity on plaintiff's claim, defendants chose to raise the eleventh amendment as a bar to suit for the first time on appeal. Had defendants pursued the defense earlier, the plaintiff would not have been prejudiced in his decision to drop the individual defendants. Plaintiff should not now be made to pay for his reliance on defendants' failure to raise the defense at trial, the defendants having specifically denied that there would be any bar to recovery should a verdict be rendered for

plaintiff. Defendants will not be awarded trial costs or costs of transcripts.

Now, Therefore,

IT IS BY THE COURT ORDERED that Order Settling Costs is hereby amended and defendants are awarded costs in the amount of $231.45 which includes the $161.45 awarded as costs by the Court of Appeals and the $70 filing fee.

/s/ Howard Bratton
HOWARD BRATTON, Chief Judge